Supreme Court, U.S.
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Docket No:

SUPREME COURT OF THE UNITED STATES
October Term 1996

John W. OVERMYER and Elizabeth Overmyer, Appellants, v. Ivan MEEKER, Executor of the Estate of Arthur C. Meeker, Deceased; National City Bank, Indiana, Crop Fertility Specialists, Kerlin Elevator, and Lincoln National Life Insurance Co., Appellees.	On Petition for Writ of Certiorari to the Court of Appeals of Indiana (Cause No: 91A04-9412-CV-488)

PETITION FOR WRIT OF CERTIORARI

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13 pp

Questions Presented For Review

I. *Is Indiana's statutory scheme for the discharge of executors of insolvent estates repugnant to the Fourteenth Amendment because the statutory option to judicially settle accounts without notice is not "...reasonably calculated, under all circumstances to apprise..." unsecured creditors of the pendency of the final proceeding and "...afford them an opportunity to present objections," to the classification of other creditors as secured and entitled to preferential payment, Mullane v. Central Hanover Bank & Trust, 339 US 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950)?*

II. *Should this Court's opinion in United States V. Daniel Good Real Property, US 114 S.Ct. 492, 502, 126 L.Ed.2d.490 (1993) be applied to hold a statutory ex parte judicial determination of a creditor's entitlement to preferential payment out of an insolvent estate insufficient to protect unsecured creditors' rights to ownership of the money paid?*

(B)

List of Parent Companies and Nonwholly Owned Subsidiaries

Appellee-parent - Crop Fertility Specialists, Inc.

Subsidiaries:
Crop Fertility Specialists of Urbana, Indiana, Inc.
Crop Fertility Specialists of Winamac, Indiana, Inc.
Crop Fertility Specialists of Bourbon, Indiana, Inc.

Appellee-parent - The Lincoln National Life Insurance Company

Subsidiaries:
Lincoln National Corporation
Indiana - Holding Company

American States Lloyds Insurance Company
Lloyds Plan - Texas - Property/Casualty

Aseguradora InverLincoln, S.A. Compania de Seguros y Reaseguros, Grupo Financiero InverMexico
49%-Mexico-Life, Property & Casualty Insurance

LineAm Properties, Inc.
50%-Delaware-Real Estate Investment

Corporate Agencies: Lincoln Financial Group, Inc. (LFG) has been subsidiaries of which LFG owns from 80-100% of the common stock. These subsidiaries serve as the corporate agency offices for the

marketing and servicing of products of the Lincoln National Life Insurance Company. Each subsidiary's assets are less than 1% of the total assets of the ultimate controlling person.

Delaware International Advisers Ltd.
81.1%-England-Investment Advisor

Delaware International Advisers Ltd.
18.9%-England-Investment Advisor

Lincoln National Mezzanine Fund, L.P.
50%-Delaware-Mezzanine Financing Limited Partnership

Lincoln National Underwriting Services, Ltd.
90%-England/Wales-Life/Accident/Health Underwriter
(Remaining 10% owned by Old Fort Ins. Co. Ltd.)

Servicios de Evaluacion de Riesgos, S. de R.L. de C.V.
51%-Mexico-Reinsurance Underwriter
(Remaining 49% owned by Lincoln National Corp.

CL CR Management Ltd.
50%-England/Wales-Administrative Services

Lincoln National Underwriting Services, Ltd.
10%-England/Wales-Life/Accident/Health Underwriter (Remaining 90% owned by Lincoln Nat'l. Reinsurance Co.)

Servicios de Evaluacion de Riesgos, S.de

R.L. de C.V.
49%-Mexico-Reinsurance Underwriter
(Remaining 51% owned by Lincoln Nat'l.
Reinsurance Co.)

LINCOLN FINANCIAL GROUP, INC.
CORPORATE AGENCY SUBSIDIARIES

Lincoln Financial Group, Inc. (AL)
Lincoln Southwest Financial Group, Inc.
(Phoenix, AZ)
Lincoln Financial and Insurance Services
Corporation (Walnut Creek, CA)
California Fringe Benefit and Insurance
Marketing Corporation DBA/California
Fringe Benefit Company (Walnut Creek,
CA)
Colorado-Lincoln Financial Group, Inc.
(Denver, CO)
Lincoln National Sales Corporation of
Connecticut (formerly: The Lincoln
Financial Group, Inc.) (Norwalk, CT)
Lincoln National Financial Services,
Inc. (Lake Worth, FL)
CMP Financial Services, Inc. (Chicago,
IL)
Lincoln National Sales Corporation of
Indiana, Inc. (Indianapolis, IN)
Lincoln Financial Group of Northern
Indiana, Inc. (Fort Wayne, IN)
The Financial Group, Inc. (Mission, KS)
Financial Planning Partners, Ltd.
(Mission, KS)
The Lincoln National Financial Group of
Louisiana, Inc. (Shreveport, LA)
Benefits Marketing Group, Inc. (D.C. &
Chevy Chase, MD)
Morgan Financial Group, Inc. (Baltimore,
MD)

Lincoln Financial Services and Insurance Brokerage of New England, Inc. (formerly Lincoln National of New England Insurance Agency, Inc. (Worcester, MA)
Lincoln Financial Group of Michigan, Inc. (Troy, MI)
Financial Consultants of Michigan, Inc. (Troy, MI)
Lincoln Financial Group of Missouri, Inc. (formerly: John J. Moore & Associates, Inc.)(St. Louis, MO)
Financial Associates, Inc. (Omaha, NE)
Beardslee & Associates, Inc.(Clifton, NJ)
Lincoln Financial Group, Inc. (formerly: Resources/Financial, Inc.)(Albuquerque, NM
Lincoln Financial Group/Carolinas, Inc. (Charlotte, NC)
Lincoln Cascades, Inc. (Portland, OR)
Lincoln Financial Services, Inc. (Pittsburgh, PA)
Lincoln National Financial Group of Philadelphia, Inc. (Philadelphia, PA)
Cavalier Financial Planners, Inc. (Philadelphia, PA)
Lincoln Financial Group, Inc. (Salt Lake City, UT)
Lincoln Financial Services of Virginia, Inc. (Norfolk, VA) (DBA/Group Concepts Unlimited)

Appellee, National City Bank, Indiana

Parent - National City Corporation

Subsidiaries:
Bank Service Corporation of Indiana
33.33% - Other Holding Company

M.N.B. Trustee Company (UK) Limited
50% - Pension, Health & Welfare Funds

Appellee, Kerlin Elevator, no parent, no subsidiaries

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(D)

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORT OF THE OPINION OF INDIANA COURT OF APPEALS SOUGHT TO BE REVIEWED

John W. OVERMYER and Elizabeth Overmyer, Appellants,
v.
Ivan MEEKER, Executor of the Estate of Arthur C. Meeker, Deceased; National City Bank, Indiana, Crop Fertility Specialists, Kerlin Elevator, and Lincoln National Life Insurance Co., Appellees.

No. 91A04-9412-CV-488.
Court of Appeals of Indiana.
March 6, 1996.
661 N.E. 2d 1271, Overmyer v. Meeker, (Ind. App. 1996)

(E)

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

(i.) Indiana Court of Appeals opinion entered, March 6, 1996.

(ii.) Petition to Transfer filed with the Supreme Court of Indiana on March 21, 1996, was overruled on July 2, 1996, *See*: Rule Ind. Ap. 11(B).

(iii.) Rule 12.5 is inapplicable.

(iv.) 28 USC § 1257 is believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question.

(v.) The notifications required by Rule 29.4(c) concerning the constitutionality of Ind Code 29-1-8-8 have been made by serving the Attorney General of Indiana with copies of this petition.

(F)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

(i.) United States Constitution Amendment Fourteen

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(ii.) Ind. Code 29-1-8-8, which provides as follows:

> "Sec. 8. Whenever, after the inventory has been filed by a personal representative, it is established that the estate of a decedent, exclusive of allowance to the surviving spouse or dependent children, does not exceed an amount sufficient to pay the claims of classes 1 to 6 inclusive, the personal representative upon order of the court shall pay the same in the order provided and thereafter present his account with an

application for the settlement and allowance thereof. Thereupon, the court, with or without notice, may adjust, correct, settle, allow or disallow such account, and, if the account is settled and allowed, decree final distribution, discharge the personal representative and close the administration." (emphasis added)

(iii.) Ind. Code 29-1-16-6 (c), which provides, in pertinent part, as follows:

"Upon the filing of any account in a decedent's estate, hearing and notice thereof shall be had as follows:
(c) If the account is intermediate and the personal representative makes no request (1) for authority to distribute any of the assets of the estate, or (2) that said account may be made final as to the matters and things reported in said account, the court may order such notice as he deems necessary or approve the same ex parte and without notice. Every such intermediate account approved without notice shall be subject to review by the court at any time and shall not become final until the personal representative's account in final settlement is approved by the court."

(G)

STATEMENT OF THE CASE SHOWING HOW AND WHEN FEDERAL QUESTIONS WERE RAISED

Although the clerk of the Circuit Court, White County, Indiana, notified appellants that executor's petition to close decedent's estate as insolvent "pursuant to Ind. Code 29-1-8-8," was set for hearing on September 19, 1994, (notice of hearing & executor's petition to close estate as insolvent, record of proceedings,"R.P." below, p. 6, 182, 122, 123),[1] when appellant's counsel subpoenaed the executor to testify on that date the state trial court denied counsel the right to examine the

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[1]**"WHEREFORE**, said Ivan Meeker, as Executor of the Estate of Arthur C. Meeker, deceased, prays that this estate pursuant to the provisions of I.C. 29-1-8-8, be ordered closed as an insolvent estate, with notice to the attorneys of record, that the proposed distribution be approved by the Court, and that said Executor be **released and discharged from any further liability or responsibility with regard to said estate.**"(emphasis added)

executor concerning the source of cash held by him during the period of his trust, (op. bel., app. p. viii).

This attorney immediately objected as follows: (transcript of trial court proceedings "trans.", R.P. p. 355, 356)

> MR. BUCHANAN: "Well, I want to make an objection, Your Honor. I object to the court's not permitting me--I want the record to show that Ivan Meeker is present in the courtroom in response to my subpoena *duces tecum*. I want the record to show that Your Honor is denying me the right to examine the witness and I object on the grounds that Mr. and Mrs. Overmyers' due process rights are denied by me being denied the right to examine a party in this case."

The trial judge responded that a legal issue had been presented which disposed of the matter and stated "I think we're wasting a lot of people's time if we try and take an evidentiary hearing at this point.," (trans., R.P. 379, 380). In its formal entry of final

judgment, in which it directed the entry of judgment on its finding that "The Executor's Petition to Close Estate as Insolvent is hereby Granted.," the trial court stated the reasons for its refusal to hear the testimony of the executor, or any evidence upon the executor's petition to close the insolvent estate, as follows: (op. bel., app. p.vii, & verb. stmt.of tr.ct jgmt., app. p.xii, xiii)

> "**Since the court has determined that Overmyers are unsecured creditors only, there is no need for the court to hear evidence on where the cash held by the executor came from**, since there is no dispute as to what is held, but only as to whom is entitled to such cash." **(emphasis added)**

The Indiana Court of Appeals affirmed this decision, on March 6, 1996, holding that "The trial court conducted a hearing on the executor's petition to close the estate on September 19,

1994.," but declined to address the issue of the trial court's refusal to hear evidence, because:

> "the [trial] court's interlocutory order that Overmyers are **unsecured** creditors, having no specific lien rights in cash assets of the estate, [was not] contrary to our holding in Lincoln Nat. Life Ins. Co v. John W. and Elizabeth Overmyer, supra.[2] (op. bel., app. p .x)

After the opinion was handed down, appellants, on March 21, 1996, proceeded directly to the Indiana Supreme Court via petition to transfer, Ind. Rule Ap. 11(B), (pet. tr., app. p. xiii). As authorized by Ind. Rule. Ap. 11(B)(2)(e), appellants contended that the opinion of the court of appeals failed to give a statement in writing upon the second issue raised and argued, namely, "By refusing to hear evidence

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[2]530 NE 2d. 785, (Ind. App. 1988)

concerning the source of cash assets of the estate, the trial court failed to perform its duty to correct possible errors in the executor's final report, and could not fulfill its responsibility of designating the creditors and amounts to whom distribution of the estate should be made." Under "Issue II," presented to the court of appeals, appellants contended that the refusal of the trial court to hear evidence violated due process, to the prejudice of unsecured creditors, because there was no evidence supporting preferential payments out of the estate cash to National City Bank, Indiana (formerly, First National Bank of Logansport, herein, "the bank"). (pet. tr.,app.p. xvi, xvii). Pursuant to the Indiana rules of appellate procedure the Indiana

Supreme Court has exclusive jurisdiction of the "... supervision of the exercise of jurisdiction by the other courts of the State...", Ind Rule Ap. 4(A)(5). Refusal of an Indiana trial court to hear evidence is a jurisdictional issue, *State ex rel. Anderson-Madison County Hospital Development Corp. v. Superior Court of Madison County*, 199 N.E. 2d 88, 245 Ind. 371 (Ind. 1964).

Appellants cited the Indiana Supreme Court to *Windsor v. McVeigh* (1876), 93 US 274, 23 L.ed. 914; and *Logan v. Zimmerman Brush Co.* (1982) 455 US 422, 428-430; 102 S. Ct. 1148; 71 Led. 2d. 265, 273-275, and contended, *inter alia*, that "... by denying creditors of the estate the right to be heard and cross-examine the executor at the statutory final hearing in the estate, the lower

court deprived appellants of a property interest, without due process of law, and, denied them the equal protection of the laws, contrary to the Fourteenth Amendment," (app. p. xx). The Indiana Supreme Court denied transfer on July 2, 1996, without comment, which terminated the litigation between the parties in the Indiana Supreme Court, (ord. den. tr., app. p. xxiii), Ind. Rule Ap. 11(B)(4).

Appellants' subpoena duces tecum to the executor raised evidentiary issues concerning the executor's receipts of cash and cash expenditures as shown on his intermediate account, (R.P. p. 212). The trial court, exercising discretion conferred by Ind. Code 29-1-16-6(c), had ordered the intermediate account approved, *without notice*, more than two

years before the proceedings on September 19, 1994, (R.P. p. 52.), and, a few months after its *ex parte* approval of the intermediate accounting, the trial court found that "the debts of the estate far exceed the assets," (R.P. p. 70).

However, as appellants' counsel stated to the trial court during the proceedings for final settlement, after the court had denied counsel the right to examine the executor: (trans., R.P., p. 381, 382)

> APPLNTS' ATTY:"The Bank was paid in- whenever they were paid out of the estate back in '88 or whenever it was.
> ESTATE'S ATTY: The Bank hasn't been paid, your Honor.
> APPLNTS' ATTY: They received four hundred and fifty-eight thousand dollars out of this estate, Your Honor, according to the intermediate accounting.
> BANK'S ATTY: It was just the value of security that was abandoned to us. That's it.

APPLNTS' ATTY: Well, it shows an expenditure of four hundred and fifty-eight thousand dollars on his intermediate accounting.
BANK'S ATTY: No money, just abandonment of security.
ESTATE'S ATTY: Abandonment of what they had secured is all it was. We didn't pay them any money.
BANK'S ATTY: We haven't seen a dime."

The statements of "the bank's" and the estate's attorneys are controverted by the intermediate accounting, which is for the period April 15, 1985, through October 11, 1991, (R.P., p. 41). It shows that the executor collected $792,283, in cash, as assets of the decedent's insolvent estate, including $126,128, as cash rent, and $341,571, from the sales of soybeans and corn. (Rp. 46-48)

The "Expenditures" side of the intermediate accounting represents that at some time in the period of the intermediate accounting the executor

paid $464,248 to "the bank," (R.P.p.50). Itemized as "Expenditure 112," the amount is represented to be the total of (1) the sales of property, including corn and soybeans, "subject to ['the bank's'] lien," and, (2) the settlement from a lawsuit "subject to ['the bank's'] lien." (intermed. acct., R.P.,p.50)

The 112 expenditures itemized in the intermediate account when deducted from the cash assets and income left a "balance on hand" of $197,352.04. The "Balance shown on Intermediate Accounting filed 11/15/'91" of $197,352.04 was entered by the executor on his final accounting, which he attached to his petition to close estate as insolvent. Deduction of further expenditures itemized in the final

accounting left a "balance on hand" for distribution to unsecured creditors of $50,876.06, (R.P. p. 124).

ARGUMENT

I

DENIAL OF OPPORTUNITY TO CONTEST

Acting pursuant to discretion conferred upon it by a statute of the state of Indiana, Ind. Code 29-1-8-8, a state trial judge denied appellants the opportunity to interrogate an executor at the final proceeding to close an insolvent estate merely because appellants are unsecured creditors. "Certainly, the proceeding [was] one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process," *Mullane, supra*, 339 US at 313, 94 L.Ed. at 873, because the usual rules

of *res judicata* bar interested persons from subsequent action against the executor for illegal impairments of their interests after the complete settlement of an estate in an Indiana court, *Loyd v. Loyd*, 731 F. 2d. 393, 402, (CCA 7, Ind., 1984); *see:* Ind. Code 29-1-16-8.

In Indiana, "...the personal representative is regarded as the trustee... appointed by law for the benefit or protection of...creditors" of the estate, *Diaz v Duncan*, 406 NE 2d. 991, 1002, (Ind. App. 1980). Thus, the facts in this case raise issues concerning the final settlement of trust fund accounts by fiduciaries similar to the issues which the Court considered in *Mullane*.

The Court, in *Logan v. Zimmerman*

Brush Co., 455 US 422, 428-430; 102 S. Ct. 1148; 71 L.Ed. 2d. 265, 273-275 (1982), summarized *Mullane*, as follows:

> "Justice Jackson, writing for the Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), observed: 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313, 94 L.Ed. 865, 70 S.Ct. 652. At the outset, then we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due.
> The first question, we believe, was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. There, the Court confronted a challenge to a state law that provided for the settlement of common trust fund accounts by fiduciaries, upon notice given through newspaper publication. The effect of the statute was to terminate 'every right which beneficiaries would otherwise

> have against the trust company...for improper management of the common trust fund.'Id, at 311, 94 L.Ed 865, 70 S,Ct.652. This, the Court concluded, worked to deprive the beneficiaries of property by, among other things, 'cut[ting] off their rights to have the trustee answer for negligent or illegal impairments of their interests.' Id., at 313, 94 L.Ed. 865, 70 S.Ct. 652. Such a result was impermissible unless constitutionally adequate notice and hearing procedures were established before the settlement process went into effect. Id., at 94 L.Ed. 865, 70 S.Ct. 652.

A.) Property Rights Protected by Fourteenth Amendment

Appellants challenge a state law providing for the settlement of the accounts of executors, i.e. "trustees," of insolvent estates "with or without notice," to unsecured creditors.

Ind. Code 29-1-8-8 provides as follows:

> "Sec. 8. Whenever, after the inventory has been filed by a personal representative, it is established that the estate of a decedent, exclusive of allowance to

the surviving spouse or dependent children, does not exceed an amount sufficient to pay the claims of classes 1 to 6 inclusive, the personal representative upon order of the court shall pay the same in the order provided and thereafter present his account with an application for the settlement and allowance thereof. Thereupon, the court, **with or without notice**, may adjust, correct, settle, allow or disallow such account, and, if the account is settled and allowed, decree final distribution, discharge the personal representative and close the administration." (emphasis added).[3]

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[3] This section is similar to Sec. 92 of the Model Probate Code.

COMPARATIVE LAWS:

Tex.--V.A.T.S. Probate Code Sec. 143. Kan.--K.S.A. 59-1507.

Minn.--M.S.A. 525.51.(*Repealed: 1995)* Minnesota Statutes Annotated § 524.3-1203 subds. 1-5, (part of the Uniform Probate Code adopted as *Minn. Laws 1995 ch. 130 § 20, see: Uniform Laws Anno., Master Ed. Vol. 8.)*, are provisions concerning the settlement and closing of insolvent estates. Subd. 1 provides, in pertinent part, "...if there is no property except...property that may be apportioned for the payment of property selection...the allowances of the spouse and children, and expenses and claims provided in § 524.3-805(a)(1) to (6), the personal representative, by order of court may pay the estate in the order named.

> The court may then, with or without notice, summarily determine the heirs, legatees, and devisees in its final decree of order of distribution assigning to them their share or part of the property with which the personal representative is charged."

"Classes 1 to 6," and their order of payment, are specified in Ind. Code 29-1-14-9 as: (1) Costs and expenses of administration. (2) Reasonable funeral expenses. (3) Survivor's allowance under IC 29-1-4-1. (4) All debts and taxes having preference under the laws of the United States. (5) Medical expenses of last sickness. (6) All debts and taxes having preference under the laws of this state.

The seventh and final class, into which appellants' $250,000 unsecured claim falls, is "All other claims

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However, § 524.3-1203 subd. 5, provides, in pertinent part, that "In the event that an improper distribution or disbursement is made in a summary closing...as shown by the personal representative or petitioner...resulting in damage...the court may **vacate** its summary decree or closing order...after hearing held thereon on 14 days' notice of hearing...personally served upon the personal representative...distributee or recipient of assets where appropriate." (emphasis added)

allowed." IC 29-1-14-9 concludes by providing that "No preference shall be given in the payment of any claim over any other claim of the same class..."

Indiana's statutory scheme for the discharge of executors of insolvent estates is repugnant to the Fourteenth Amendment because the statutory option to settle accounts without notice is ***not*** "...reasonably calculated, under all circumstances, to apprise..." unsecured creditors of the pendency of the final proceeding and "...afford them an opportunity to present objections," to the classification of other creditors as secured and entitled to preferential payment, *Mullane, id.*

In an insolvent estate where the assets are insufficient to pay all claims, the issue of which creditors are

entitled to preferential payment is the most important. When, as here, the largest proportion of estate assets consists of cash derived from the sale of crops, the question, which the trial court refused to permit appellants' counsel to ask, namely, "where the cash held by the executor came from," must be answered, (tr. cts.' fin.jgmt,app.,p.ix; stmt. of case). Ind. Code 26-1-9-203 provides, in pertinent part, that "...a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless: (a)... the debtor has signed a security agreement which contains a **description of the collateral** and in addition, when the security interest covers crops growing or to be grown...**a description of the land**

concerned;" (emphasis added).

In the case-at-bar, the executor diminished the money available to pay unsecured creditors by nearly half a million dollars when he paid $464,248--- 58% of total cash assets--- to "the bank," representing to the trial court that the amount was the proceeds of the sales of property, including corn and soybeans, "subject to [the bank,s] lien." *Ex parte*[4], the trial court authorized the preferential payment to the bank, and at the final proceedings to discharge the executor, denied appellants the right to examine him about where the cash in his hands came from, although 43% of total cash assets

---

[4]IC 29-1-16-6(c) "If the account is intermediate...**the court may order such notice as he deems necessary or approve the same ex parte and without notice.**" (emphasis added) *see;* p. XV, *supra*

were derived from sales of corn and soybeans, (stmt. of case). Thus, without a hearing of any kind, judgment was entered permanently depriving unsecured creditors of a *pro rata* share in money to which they may have been entitled if "the bank" did not hold a valid security agreement upon the property described in "Expenditure 112."

B.) Process Due: Analogy to Federal Cases Affirming the Right to Defend Forfeiture Cases

The reasoning of the Seventh Circuit Court of Appeals in *U.S. v.$40,877.59 in U.S. Currency*, 32 F.3d 1151 (7th Cir. 1994, Ind. 1994), is relevant to an analysis of the facts below. The opinion reverses a district court judgment permanently forfeiting funds to the United States, under the fugitive disentitlement doctrine, "without a

hearing of any kind," pursuant to 18 U.S.C. § 981, 32 F.3d at 1152. "However, the Supreme Court has established that notwithstanding an individual's status, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him; that the constitutional right to defend is inseparable from the liability to suit. *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 20 L.Ed. 80 (1870); *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897). We think that the right to defend applies to fugitives as well," 32 F.2d at 1153.

Under the Indiana statutory procedure for insolvent estates, the state authorizes the personal representative named in the will to initiate the proceeding for the

administration of the decedent's estate and mandates that the executor "shall take possession of all the real and personal property of the decedent...," Ind. Code 29-1-7-4, 29-1-13-1. An unsecured creditor must use the adjudicatory procedures established by the Probate Code, and file a claim against the estate, or his claim against "the estate, the personal representative, the heirs, devisees and legatees of the decedent..." "shall be forever barred," Ind Code 20-1-14-1; *see: Logan v Zimmerman Brush Co., supra* 455 US at 429,430; 71 L.Ed. 2d at 274.

When an Indiana probate court settles the account of an executor of an insolvent estate, "without notice," it proceeds in a manner similar to a district court which applies the

fugitive disentitlement doctrine--"The status quo is altered, property is redistributed, and all without any hearing whatsoever on the merits of the cause," *$40,877.59 in U.S. Currency*, 32 F.3d at 1156.

C.) Constitutional Insufficiency of Ex Parte Determination Of Preferences

The lower court's *ex parte* determination of "the bank's" entitlement to preferential payment is incompatible with this Court's opinion in *United States v. Daniel Good Real Property*, --- U.S. ----, 114 S.Ct. 492, 502, 126 L.Ed. 2d 490 (1993), that an ex parte hearing is an insufficient procedure to justify even a temporary impairment of one's property rights, although there will be a full post-deprivation hearing.

"In issuing a warrant of seizure, the

> magistrate judge need determine only that there is probable cause to believe that the real property was [used, or intended to be used, in the commission of a crime]. The Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have. Nor would that inquiry, in the ex parte stage, suffice to protect the innocent owner's interest. '[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'"(citations omitted) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72, 71 S.Ct. 624, 647-49, 95 L.Ed. 817 (1951))

It is fairly obvious that the Indiana trial court's "secret one-sided determination" of "the bank's" entitlement to preferential payment out of the insolvent estate did not obtain fairness. The trial court discharged the executor without knowing not only where the cash in his hands came from

but who received it. "The bank's" and the estate's attorneys, during argument, claimed the money shown paid to "the bank" in "Expenditure 112," of the intermediate account, was merely "abandonment of security;" "The bank's" attorney actually stated to the trial court, "We haven't seen a dime," (stmt. of case). But the sales of fungible commodities such as corn and soybeans result in cash equivalent to market prices quoted hourly. The payment of the proceeds of commodities' sales shown under Expenditure 112 can not be "abandonment of security," *id.* A full hearing on the merits is necessary to investigate the disposition of the cash shown distributed by the executor in Expenditure 112. If a hearing identifies a recipient who did not own

an enforceable security interest, then the executor should answer to the unsecured creditors for "illegal impairments" of their right to *pro rata* payment out of his trust fund, *Mullane, supra.*[5]

Indiana's probate procedure 1.) authorized the trial court to approve the intermediate account, and the executor's preferential payment to "the bank," (if that is who received the money), *ex parte,* IC 29-1-16-6 (c), *see: p. XVI, supra;* then, 2.) upon a finding of insolvency, empowered the trial court to finally settle the insolvent estate, by summary proceedings, "without notice," IC 29-1-8-8.

---

[5]For example, adding $464,000 to the amount available for distribution to unsecured creditors increases the value of appellants' $250,000 unsecured claim from 2.7¢ on the dollar to 28¢ on the dollar.

Although the clerk of the trial court may have notified appellants that the judge had "set a hearing" for a certain date upon the executor's petition to close estate as insolvent "pursuant to IC 29-1-8-8," (stmt. of case), when appellants subpoenaed him to testify at that time, the court ruled that evidence was a waste of time, and denied unsecured creditors the right to be heard, (stmt. of case). The Court's holding in *Windsor v. McVeigh,* 93 US 274, 277, 278; 23 L.Ed. 914, discloses that although appellants were present in court in response to notice, when the trial court refused to hear evidence before settling the executor's accounts and discharging him, his final decree deprived them of property "without notice," within the due process clauses:

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. *A denial to a party of the benefit of a notice would be in effect to* ***278** *deny that he is entitled to notice at all*, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard." (emphasis added)[6]

---

[6]Indiana has adopted a Model Probate Code provision which provides as follows, Ind. Code 29-1-1-21:

"For illegality, fraud or mistake, upon application within one [1] year after the discharge of the personal representative upon final settlement, the court may vacate or modify its orders, judgments and decrees or grant a rehearing therein." *compare:* Uniform Probate Code, footnote 3, *supra*.

However, unless this Court finds the trial court's

The Seventh Circuit Court of Appeals has held that the estate closing procedures in a **solvent** Indiana estate[7] "...fully satisfied the mandate of *Mullane*." by according interested parties the opportunity to be heard, *Loyd v. Loyd, supra,* 731 F. 2d. at 400, 401 ("[Plaintiff] had prior notice of the relevant proceedings yet she chose not to participate," by introducing evidence). And, if due process of law accords a fugitive claimant, or a party in contempt of court, *Hovey*, a hearing

---

refusal to hear evidence a denial of due process, appellants, under the precedent of the Seventh Circuit Court of Appeals construing IC 29-1-1-21, in context with the Fourteenth Amendment, "will be bound by the litigation in which the issue could have been raised," *Loyd v. Loyd, supra,* 731 F. 2d. at p. 402.

[7]Ind. Code 29-1-16-6(a) "...the court or clerk **shall** set a date for hearing of the final account and petition for distribution and the clerk **shall** give notice to all persons entitled to share in the final distribution..."

where evidence is heard before rights to property are finally, or, even, temporarily, adjudicated, it should entitle unsecured creditors of an **insolvent** Indiana estate to a final settlement and discharge hearing where they can interrogate the executor about preferential payments, ordered at a prior "secret, one-sided," *ex parte* hearing, *Good, supra*.

Appellants respectfully pray that the writ shall be allowed.

APPENDIX

Opinion of Indiana Court of Appeals Sought To Be Reviewed

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661 N.E.2d 1271, Overmyer v. Meeker, (Ind.App. 1996)

***1271** John W. OVERMYER and Elizabeth Overmyer, Appellants,
v.
Ivan MEEKER, Executor of the Estate of Arthur C. Meeker, Deceased; National City Bank, Indiana, Crop Fertility Specialists, Kerlin Elevator, and Lincoln National Life Insurance Co., Appellees.

No. 91A04-9412-CV-488.
Court of Appeals of Indiana.
March 6, 1996.

***1272** Appeal from the White Circuit Court; R. Perry Shipman, Special Judge, Cause No. 10595.

James P. Buchanan, Buchanan & Buchanan, Lebanon, for appellants.

Donald J. Tribbett and Scott L. Starr, Starr Austen Tribbett & Myers, Logansport, for appellees.

OPINION

DARDEN, Judge.

STATEMENT OF THE CASE

[1] John W. and Elizabeth Overmyer appeal the trial court's grant of the executor's petition to close Arthur Meeker's estate as insolvent. We affirm.

FACTS

Many of the facts relevant to this appeal were summarized as follows in *Lincoln Nat'l Life Ins. Co. v. Overmyer*, 530 N.E.2d 784 (Ind.Ct.App.1988), trans. denied:

> John W. and Elizabeth Overmyer originally owned the real estate which is the subject of the dispute today. They sold the real estate by land contract to Arthur C. Meeker; Meeker's obligations under this contract were never completely satisfied. Meeker sought to obtain a loan from Lincoln secured by this real estate.
>
> In order to facilitate the loan, the Overmyers gave Meeker title to the property by general warranty deed to enable him to give Lincoln a first mortgage on the real estate. The

Overmyers orally agreed, in consideration for making the conveyance, to accept $600,000.00 cash from the loan proceeds (less than the $1,050,000.00 payoff balance of their land contract). Also, unbeknownst to Lincoln, the Overmyers orally agreed to accept a second mortgage on the real estate in question or a first mortgage on certain real estate near Burnettsville owned by Meeker from Meeker to secure the unpaid balance of the land contract.

On the basis of these undisputed agreements, Meeker recorded his deed and Lincoln recorded its mortgage; Lincoln loaned Meeker $1,200,000 of which $600,000 was directly disbursed to the Overmyers. Meeker gave a second mortgage to the real estate in question to the First National Bank of Logansport and never got around to giving the Overmyers any other security for the unpaid balance of the land contract.

Meeker died. Lincoln and the Overmyers filed claims against his estate. Lincoln also filed an action to foreclose its mortgage on the real estate; its claim, principal and interest, amounted to $1,662,429.60 as of August 31, 1985. The Overmyers asserted a vendor's lien on the real estate in question based upon the unpaid balance of the original land contract which amounted

*1273 to $640,479, principal

interest. The parties stipulated the fair market value of the land was insufficient to satisfy even the principal amounts of the two loans.

Lincoln and the Overmyers filed cross motions for summary judgment. The trial court granted the Overmyers' motion and denied Lincoln's, giving the Overmyers' security interest priority over Lincoln's. Upon Lincoln's motion to correct errors, the court amended its judgment and established priority as follows:

> Lincoln--first $600,000;
>
> Overmyers--next $450,000 plus interest
>
> Lincoln--any remaining proceeds to satisfy claim for interest

Id. at 785.

Lincoln appealed and we found that:

> the Overmyers waived their vendor's lien 'to the extent of the mortgage made' to Lincoln. The Overmyers' vendor's lien, though not lost, attached only to Meeker's equity of redemption and any surplus remaining from the proceeds of the mortgage foreclosure sale after the proceeds have been applied in discharge of Lincoln's mortgage lien.

Id. at 787. (Emphasis in original). Accordingly, we reversed the summary

judgment in favor of the Overmyers and remanded with instructions that the trial court grant Lincoln's summary judgment motion.

On November 15, 1989, the trial court entered a "Final Judgment and Decree of Foreclosure and Sale," wherein the trial court awarded Lincoln a $2,575,387.26 judgment. The trial court further concluded as follows:

> The Mortgage held by Lincoln ... shall be and is hereby foreclosed as a first and priority lien against all the Parties and the equity of redemption of all Parties and all persons claiming from, under or through any of the Parties, in and to the Real Estate, shall be and the same is foreclosed, subject to the lien of current taxes not delinquent.

(R. 138-39). On January 9, 1990, pursuant to the decree of foreclosure, the sheriff sold the farm, and Lincoln bought it for $1,300,000.00, approximately $1,275,387.26 less than Lincoln's judgment against Meeker's estate.

On March 10, 1992, the executor filed a petition for allowance of fees to the executor and to the estate's attorney, which the trial court granted that same day. On March 13, 1992, the trial court approved an agreement wherein the Overmyers were allowed a $250,000.00 claim against the estate. Subsequently, on March 17, 1992, the Overmyers

requested a hearing on the trial court's grant of the executor's petition for allowance of fees. At the June 4, 1992, hearing, the Overmyers argued that their claim had priority over the claims for fees. Specifically, the Overmyers argued that they still had a vendor's lien on $80,000.00--income which the farm earned during the first growing season after Meeker's death. On June 29, 1992, the trial court denied the Overmyers' claim finding that *Lincoln v. Overmyer*, supra, had limited the Overmyers' vendor's lien to the equity of redemption and the surplus from the sheriff's sale. The trial court reasoned that because the right of redemption no longer existed and there was no surplus from the sheriff's sale, there were no assets to which the Overmyers' vendor's lien could attach. The trial court further found that the $80,000.00 became a "part of the assets of the Estate of the Decedent." (R. 70).

On April 20, 1994, the executor filed a petition to close Meeker's estate as insolvent. Thereafter, the Overmyers filed four pleadings objecting to the petition. The first pleading, which was filed on April 22, 1994, alleged that the Overmyers were entitled to a "specific lien" which, according to the Overmyers, arose from the sales contract with Meeker. The second pleading, which was filed June 24, 1994, alleged that the Overmyers had a vendor's lien on the farm's income. The third pleading, which the Overmyers filed on July 1,

1994, objected to an expenditure to National City Bank (formerly the First National Bank of Logansport) to the extent that the expenditure came from income derived from the real estate subject to the Overmyers' lien. The final pleading, ***1274** filed on September 15, 1994, alleged that the farm's rents, issues and profits were included within the equity of redemption discussed in *Lincoln*, supra. According to the Overmyers, their vendor's lien attached to those rents, issues and profits. In addition, the Overmyers filed a petition requesting the trial court to marshall assets.

The trial court conducted a hearing on the executor's petition to close the estate on September 19, 1994. At the hearing, the Overmyers wanted to question the executor; however, the estate and National City Bank argued that the Overmyers' objections to closing the estate as insolvent presented a legal issue and that the executor's testimony was unwarranted. The Overmyers conceded that the court had already heard their arguments and ruled against them on June 29, 1992. The trial court agreed with the estate and concluded that evidence was unnecessary because the Overmyers' objections presented a legal issue. On October 6, 1994, the trial court granted the estate's petition to close Meeker's estate as insolvent. The court's order provides in pertinent part as follows:

1. The Overmyers' objections to

> Petition to Close Estate and Accounting of Executor, Further Objection to Accounting, Petition for Executor to Account for Rents and Profits and Petition for the Court to Marshall Assets are hereby overruled and denied.
>
> 2. The $250,000.00 claim of the Overmyers allowed by the Court against the Estate of Arthur C. Meeker does not have any priority whatsoever over the claims of [other creditors], and instead constitutes nothing more than an unsecured claim.
>
> 3. Overmyer's Petition for Executor to Account for Rents and Profits and Petition for the Court to Marshall Assets are premised on their incorrect position that they are secured creditors and have specific lien rights in the cash held by the Executor. Since the Court has determined that Overmyers are unsecured creditors only, there is no need for the Court to hear evidence on where the cash held by the Executor came from, since there is no dispute as to what is held, but only as to whom is entitled to such cash....

(R. 223). It is from this order that the Overmyers appeal.

DECISION

[2] The Overmyers now argue that the "equity of redemption, to which [their]

vendor's lien also attached, applies to rents, issues, and profits of mortgaged land sold on foreclosure, if the rents be considered as 'also mortgaged.' " (FN1) Overmyers' Brief, p. 28. In support of their argument, the Overmyers direct us to *Federal Land Bank of Louisville v. Schleeter*, 208 Ind. 9, 194 N.E. 628 (1935), (Schleeter II), wherein our supreme court denied Federal Land Bank's petition for rehearing. However, the facts of the Schleeter cases do not support the Overmyers' contentions.

First, in *Federal Land Bank of Louisville v. Schleeter*, 208 Ind. 9, 193 N.E. 378 (1934), (*Schleeter* I), our supreme court was asked to determine whether the trial court erred when it denied Federal Land Bank's petition for the appointment of a receiver. There was no such petition in this case. Next, in *Schleeter* II, our supreme court provided as follows:

> A mortgage on the land carries with it every beneficial interest which would include the rents, issues, and profits; but if it were not so, and the rents, issues and profits were considered as mortgaged, in addition to the land, so that upon foreclosure not only the land, but the rents, issues and profits must be sold, the right of redemption applies to the latter.

Schleeter, 194 N.E. at 629. Here, there was no land mortgage between

Meeker and the Overmyers, and the rents, issues, and profits were not considered as mortgaged. Rather, the Overmyers' had a vendor's lien which arose by implication of law in favor of them ***1275.** to secure the payment of the unpaid purchase price of their farm._ See *Lincoln*, supra.

Further, we have previously stated that a foreclosure sale terminates the right of redemption. *Patterson v. Grace*, 661 N.E.2d 580 (Ind.Ct.App.1996), *Vanjani v. Federal Land Bank of Louisville*, 451 N.E.2d 667, 672, n. 1 (Ind.Ct.App.1983). Therefore, the January 9, 1990, sheriff's sale terminated the Overmyers' right of redemption. (FN2) We find no error.

Affirmed.

RILEY and ROBERTSON, JJ., concur.

FN1. The Overmyers acknowledge that there was no surplus from the proceeds of the foreclosure sale.

FN2. The Overmyers further argue as follows:

> The trial court's final judgment that there was no need for the Court to hear evidence on where cash held by the Executor came from "... since the Court has determined that Overmyers are unsecured creditors only, ..." (br. supra p. 16), is reversible error if the court's interlocutory order that Overmyers are unsecured

creditors, having no specific lien rights in cash assets of the estate, is contrary to our holding in *Lincoln Nat. Life Ins. Co. v. John W. and Elizabeth Overmyer*, supra.

The Overmyer's brief, p. 26. (Emphasis added). Because we have found that the trial court's order is not contrary to the holding of *Lincoln*, we need not address this issue."

Findings of Fact & Conclusions of Law of Circuit Court White County, Indiana

"STATE OF INDIANA) IN THE WHITE CIRCUIT
)ss: COURT
COUNTY OF WHITE) 1994 TERM

IN RE THE ESTATE OF)
ARTHUR C. MEEKER,)
Deceased,)
)CAUSE NO 10595,
NATIONAL CITY BANK)C-320-85
(formerly known as)
the First National)
Bank of Logansport,) "Filed Oct 06 1994
JOHN W. OVERMYER;) Faye L. Lowery
and ELIZABETH) Clerk White
OVERMYER; KERLIN) Circuit Court"
ELEVATOR and CROP)
FERTILITY)
SPECIALISTS, INC.,)
Claimants)

ORDER GRANTING EXECUTOR'S PETITION TO CLOSE ESTATE AS INSOLVENT, OVERRULING OVERMYERS' OBJECTIONS TO EXECUTOR'S

PETITION AND DENYING OVERMYERS' PETITION FOR THE COURT TO MARSHALL ASSETS AND OVERMYERS' PETITION FOR THE EXECUTOR TO ACCOUNT FOR RENTS AND PROFITS

Comes now Ivan Meeker, Executor of the Estate of Arthur C. Meeker, and files his Petition to Close Estate as Insolvent, in the following words and figures, to-wit: (H.I.), and comes now John W. Overmyer and Elizabeth Overmyer, Claimants in the Arthur C. Meeker Estate, and file their Objections to Meeker's Motion to Close Estate and Final Account, Petition for Executor of Account for Rents and Profits, and their Petition for the Court to Marshall Assets, in the following words and figures, to-wit: (H.I.)

And the Court after considering said Motions, and the briefs and memorandum filed by the Overmyers, Meeker and the National City Bank, and after hearing the argument of counsel for Overmyers, Meeker and the National City Bank in open court on September 19, 1994, and otherwise being duly advised in the premises, now finds and rules as follows:

1. The Overmyers' objections to Petition to Close Estate and Accounting of Executor, Further Objection to Accounting, Petition for Executor to Account for Rents and Profits and Petition for the Court to Marshall Assets are hereby overruled and denied.

2. The $250,000.00 claim of the Overmyers allowed by the Court against the Estate of Arthur C. Meeker does not have any priority whatsoever over the

claims of the National City Bank, Kerlin Elevator or Crop Fertility Specialists, Inc., and instead constitutes nothing more than an unsecured claim.

3. Overmyers' Petition for Executor to Account for Rents and Profits and Petition for the Court to Marshall Assets are premised on their incorrect position that they are secured creditors and have specific lien rights in the cash held by the Executor. Since the Court has determined that Overmyers are unsecured creditors only, there is no need for the Court to hear evidence on where the cash held by the Executor came from, since there is no dispute as to what is held, but only as to whom is entitled to said cash.

4. The Executor mistakenly failed to mention the Overmyers' unsecured claim in the amount of $250,000.00 in his Petition to Close Estate as Insolvent. This $250,000.00 claim of John W. and Elizabeth Overmyer is hereby ordered added to the claims of the National City Bank, Kerlin Elevator and Crop Fertility Specialists, Inc. referenced in paragraph 3 of the Executor's Petition to Close Estate as Insolvent.

5. The Executor's Petition to Close Estate as Insolvent is hereby granted. All of the remaining assets of the Estate of Arthur C. Meeker shall be distributed pro-rata to the National City Bank, Kerlin Elevator, Crop Fertility Specialists, Inc. and John W. and Elizabeth Overmyer based upon the size of these claimants' respective approved claims and/or judgments after considering any post-judgment interest

accrued on the same up to the time of distribution.

6. There is no just reason for delay, and, pursuant to Trial Rule 54(B) the Court directs the entry of judgment on each of these findings.

ALL OF WHICH IS HEREBY ORDERED, ADJUDGED AND DECREED this 19 day of September, 1994.

/s/ _____
R. PERRY SHIPMAN, Special Judge
White Circuit Court

Distributed to All Counsel of Record

"Filed Oct 06 1994
Faye L. Lowery
Clerk White Circuit Court" "

Appellants' Petition to Transfer

" IN THE
SUPREME COURT OF INDIANA
CAUSE NO:_____
(COURT OF APPEALS CAUSE NO: 91 A04-9412-CV-488)

JOHN W. OVERMYER, Deceased, & ELIZABETH OVERMYER, His Widow,

APPELLANTS,

"Filed March 21, 1996
H. John Okeson
Clerk of the
Indiana Supreme Court
Court of Appeals

and Tax Court"

-v-)
Appeal From The
)
White Circuit Court
IVAN MEEKER, EXECUTOR)
(Cause No: 10595)
Of The Estate of)
Honorable R. Perry
Arthur C. Meeker, Deceased;)
Shipman, Special Judge
NATIONAL CITY BANK, INDIANA,)
CROP FERTILITY SPECIALISTS,)
KERLIN ELEVATOR, &)
LINCOLN NATIONAL LIFE INSURANCE CO.)
)
APPELLEES)

APPELLANTS' PETITION TO TRANSFER

Appellants, by counsel, for their petition to transfer, respectfully show and move the Court as follows:

1. The Court of Appeals decided this case with a written opinion, which was handed down on March 6, 1996, and was against the appellants. No petition for rehearing was filed.

2. Appellants are secured creditors

of the above named estate by the law of the case, *Lincoln Nat'l Life Ins. Co. v. Overmyer* (Ind. App. 1988) 530 NE 2d. 784, *tr. den.*, which established that their purchase-money vendor's lien, subordinate only to the first mortgage of Lincoln National Life Insurance Co. ("Lincoln"), attached to decedent's equity of redemption in a farm (the "Overmyer farm") which became an asset of the estate, *Matter of Lemond* (Ind & Ind. App. 1980) 413 NE 2d. 228, 232.

3. On August 31, 1985, the estate was indebted to appellants, on their land contract with decedent, in the amount of $640,879, and interest has accrued, and is accruing, on this amount since that time, *Lincoln, id.*

4. After appellants' security is exhausted, the balance of the debt is an

unsecured claim in the estate, entitling appellants to a *pro rata* share of money in the hands of the executor, *La Plante v. Convery* (Ind. 1884) 98 Ind. 499; Ind. Code 29-1-14-9.

5. The opinion is in error in that:

A. The opinion fails to give a statement in writing of a substantial question which appellants stated as "Issue II" of their original brief and argued at pp. 34-48, namely,"By Refusing to Hear Evidence Concerning The Source of Cash Assets of the Estate, the Trial Court Failed to Perform Its Duty To Correct Possible Errors in the Executors's Final Report, And Could Not Fulfill Its Responsibility Of Designating The Creditors and Amounts to Whom Distribution of the Estate Should Be Made." The opinion fails to give a

statement on the substantial question argued, that since the executor had the burden of proof, *Diaz v. Duncan* (Ind. App. 1980) 406 NE 2d. 991, 1002, the lower court's refusal to hear evidence caused a complete failure of proof on the issues of preferential payments and correctness of accountings and the judgment approving the final account and distributions violated due process, *(orig. br. id.)*.

No evidence was presented at the final hearing showing that the debt due First National Bank of Logansport ("FNBL" now National City Bank, Indiana) had a "...preference under the laws of this state," IC 29-1-14-9 (6). FNBL's unsecured claim entitled it to payment of 74.4% of assets available for distribution. The lower court refused to

permit appellants to examine the executor at a meaningful hearing but approved his payments and proposed distribution to FNBL totaling $523,141--***98%***--of cash available to pay unsecured creditors.

B. As creditors of the estate, appellants were entitled, by Ind. Code 29-1-17-2, to a hearing on the final account at which the **executor** presented all available evidence and made full disclosure of all facts necessary for proper distribution of the estate, and, was subject to cross examination, *Diaz, supra*. By affirming the lower court's decision, that evidence at the final hearing was unnecessary, "... since the Court has determined that Overmyers are unsecured creditors only...," (slip op.p.6,8), and, denying appellants the

right to cross-examine the executor, the opinion contravenes the following ruling precedents of this Court:

STATE v SUPERIOR COURT OF MADISON COUNTY (Ind. 1964) 199 NE 2d 88, 93, 94

"Regardless of the conflict on this point, these critical proceedings lacked, without question, the bare requirements of due process, namely, the right to be informed specifically of the charges and a reasonable opportunity to be heard thereon. 'It is a fundamental doctrine of the law that a party to be affected by a personal judgment must have a day in court, or an opportunity to be heard. In this connection, it is sometimes declared broadly that everyman is entitled to an opportunity to be heard in a court of law upon ever question involving his rights or interests, before he is affected by any judicial decision on the question. The judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.' 30A Am.Jur., Judgments, § 26.
See also: *Windsor v McVeigh* (1876), 93 U.S. 274, 23 L.ed. 914."

STATE v SUPERIOR COURT OF MARION COUNTY (Ind. 1933) 187 NE 203,204

"The only question in the case before us is whether or not it was the **duty** of the respondent to consider and

> hear the petition of the relatrix on its merits and **to hear evidence** in support thereof, all as provided for in said act. We are clearly of the opinion that it was his duty to do so and, after hearing said petition, if the judgment and finding was adverse to the relatrix, she would then have the right to appeal to this court for a final determination of her rights. If at that time the constitutionality of the Garnishee Act was properly presented, it could then be passed upon in an orderly way. We do not think that the respondent had the right to say to the relatrix that the court will not entertain her petition and will not hear evidence in support thereof because of the fact the court believed the act in question to be unconstitucional. We think the proper procedure was for the court to proceed as provided for in the act and then render a finding and judgment as it thought proper." **(emphasis added)**

These precedents disclose that by denying creditors of the estate the right to be heard and cross-examine the executor at the statutory final hearing in the estate, the lower court deprived appellants of a property interest,

without due process of law, and, denied them the equal protection of the laws, contrary to the Fourteenth Amendment, *see, also: Logan v. Zimmerman Brush Co. (1982)* 455 U.S. 422, 428-430; 102 S.Ct. 1148; 71 L.Ed.2d. 265, 273-275; *Hunt v Shettle* (Ind. App. 1983) 452 NE 2d. 1045,1050,1051; *Archem v. Simo* (Ind App. 1990) 549 NE 2d. 1054,1059.

C. Although recognizing the ruling precedent of *Fed. Land Bank of Louisville v. Schleeter* (Ind. 1935) 194 NE 628,629, that the equity of redemption applies to rents, issues, and profits of mortgaged land sold on foreclosure, if they be considered as "also mortgaged," the opinion fails to address the issue of whether appellants are entitled to offer evidence proving their vendor's lien attached to

$338,130, which was paid by the executor to FNBL, and, himself, out of income, mortgaged to Lincoln, and generated by the "Overmyer farm" before the foreclosure sale, (*slip op. p.5-8; orig.br.p.26-31*). Since the opinion affirms the lower court's decision that appellants are "unsecured creditors only," the opinion contravenes this ruling precedent and conflicts with the opinion in *Lincoln, supra,* the law of the case.

Similarly, the opinion fails to address the issue of whether "Overmyer farm" income should have been "marshalled" by the lower court between Lincoln and Overmyers, the first and second lienholders, since Lincoln did not resort to all of the farm income for satisfaction, (*aplnts.' orig. br.pp. 31-*

34)

WHEREFORE, Appellants pray that transfer be granted, the opinion of the Court of Appeals vacated, and the judgment of the lower court reversed.

Respectfully submitted,

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(317) 482-0203

by:_____
James P. Buchanan
Attorneys for Appellants"

Order of Indiana Supreme Court
Denying Transfer

"STATE - INDIANA

217 State House
Indianapolis, IN 46204
(317)232-1930
Fax (317) 232-8365

H. John Okeson
Clerk of the Supreme Court,
Court of Appeals and Tax Court

James Buchanan
209 West North Street
P.O. Box 684

Cause Number
91A04--9412-CV-
00488

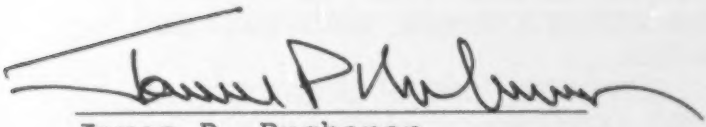
Lebanon, IN 46052 Lower Court
Number: 10595
Fax Number: 317-482-3277
OVERMYER, JOHN, ETAL -V- MEEKER, IVAN, ETAL

You are hereby notified that the SUPREME COURT has on this day 7/02/96
APPELLANT'S PETITION FOR TRANSFER IS HEREBY DENIED.
RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR. KA

WITNESS my name and the seal of said Court,
this 2nd day of July, 1996

H. John Okeson
Clerk Supreme Court, Court of Appeals and Tax Court"

Signature of Appellants' Attorney



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